AND BRIEF

No. 16-341

In The
Supreme Court of the United States

TC HEARTLAND LLC,
Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* WHIRLPOOL CORP. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Whirlpool Corp. is the number one major appliance manufacturer in the world, with approximately 93,000 employees and 70 manufacturing and technology research centers worldwide. In addition to its global headquarters and technology centers in Michigan, Whirlpool operates manufacturing facilities in Iowa, Ohio, Oklahoma, Massachusetts, and Tennessee, and employs approximately 15,000 manufacturing employees in the United States—more than all of its major competitors.

Whirlpool depends on obtaining and enforcing intellectual property to support its ability to design and manufacture innovative new products for its customers. Whirlpool has thousands of U.S. patents, and over the past decade it has successfully enforced a number of its patents against competitors. Whirlpool also has been sued by companies that might be described as "patent trolls," some of which filed in the Eastern District of Texas.

As an amicus, Whirlpool's interest is in ensuring that fast, predictable, and effective patent enforcement remains a viable option for innovative companies that develop and practice their patented technologies.

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[1] Pursuant to Rule 37.6, Whirlpool affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), all parties received appropriate notice of and consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Venue rules reflect a balancing of policy considerations, and the responsibility for making these policy judgments rests with Congress. For patent cases, Congress established the venue rules in 28 U.S.C. § 1400(b) and 28 U.S.C. § 1391(c), which dictate the relatively broad choice of venue afforded to patent plaintiffs that has been recognized by the Federal Circuit for over thirty years. Petitioner and its *amici* are free to make their case to Congress that the current approach to venue should be changed. But Congress's existing framework is supported by countervailing policy considerations that favor providing patent owners with more expansive venue options, particularly when compared to the restrictive approach advocated by Petitioner.

In instances of infringement by multiple unaffiliated parties, for example, Petitioner's approach would require patent owners to file isolated suits in numerous jurisdictions across the United States. Below, Whirlpool describes its experience enforcing its patents relating to refrigerator water filters against a multitude of infringers. Under prevailing law, Whirlpool is able to bring all of its patent lawsuits in one district. Whirlpool is concerned that Petitioner's approach may require it to file lawsuits in dozens of jurisdictions, if not more, which would dramatically increase the costs to enforce a patent, and would result in judicial inefficiencies.

Notwithstanding that the present case was filed in Delaware, *amicus* briefs supporting

Petitioner have devoted significant effort to making a case against patent practice in the Eastern District of Texas. Whirlpool urges the Court to reject their invitation to let concerns about practice in one district drive the construction of statutory provisions that establish venue in many districts across the country. While irrelevant to the statutory question, Whirlpool is also concerned that the briefing before the Court has presented an unbalanced picture of the Eastern District of Texas.

Whirlpool has been sued in the Eastern District of Texas for patent infringement by multiple entities that could be called "patent trolls." It has also filed many of its water filter patent infringement lawsuits there. Whirlpool's experience as both a plaintiff and a defendant is that patent practice in the Eastern District of Texas is neither abusive nor unreasonable. While "patent trolls" seeking nuisance value settlements no doubt file cases there, it is also an attractive venue for serious litigants looking to resolve meritorious claims. The reasons are not abusive: the judges are experienced with patent law, the local patent rules are predictable, and cases proceed to trial without undue delay. Whirlpool's water filter patent litigation does not display any of the hallmarks of abuse emphasized in the briefing before this Court, yet Whirlpool has benefited from the experience, predictability, and speed offered by the Eastern District of Texas. A result-driven statutory interpretation that would limit filings in the Eastern District of Texas would not alleviate the problem of "patent trolls"; it would simply relocate those lawsuits to other districts.

Whirlpool respectfully submits that if the venue provisions are to be revised in response to "patent trolls" or concern about the Eastern District of Texas, that revision should come from Congress after a full and careful weighing of the facts and policy considerations on each side of the debate.

ARGUMENT

I. The Federal Circuit Correctly Applied the Text of 28 U.S.C. § 1400(b) and 28 U.S.C. § 1391(c)

Sections 1400(b) and 1391(c) of Title 28 embody straightforward rules for venue in patent cases. Section 1400(b) provides that a patent defendant may be sued in either (A) "the judicial district where the defendant resides"; or (B) "where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b).

Section 1391(c) establishes, "[f]or all venue purposes," the residency of three types of defendants. 28 U.S.C. § 1391(c). Natural persons are deemed to reside in the judicial district where they are domiciled. *Id.* at § 1391(c)(1). Companies are deemed to reside "in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." *Id.* at § 1391(c)(2). Defendants not resident in the United States "may be sued in any judicial district." *Id.* § 1391(c)(3).

Taken together, sections 1391(c) and 1400(b) provide the most expansive venue options for cases against non-residents (*i.e.*, any judicial district), somewhat less expansive venue options for corporate defendants (*i.e.*, anywhere they are subject to personal jurisdiction with respect to the action), and more narrow venue options for individuals (*i.e.*, where they are domiciled or where they committed acts of infringement and have a regular and established place of business).

In addition to being the straightforward meaning of the relevant statutory provisions, the current framework also reflects the reasonable policy judgment that, as between a patent owner and an infringer that is sophisticated and well-capitalized enough to create, maintain, and benefit from a corporate structure, it is fair to give the patent owner more latitude in selecting the venue. At the same time, Congress also determined that in cases between a patent owner and a (likely less sophisticated) individual defendant, suits should be limited to venues with more substantial ties to the defendant. This plain and straightforward reading of the statute is hardly unreasonable, and this Court should not deviate from it. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.")

II. Determining Appropriate Venue is Policy-Driven and Should be Left to Congress

Compared to the current framework, Petitioner's proposed approach to venue would strike a balance that weighs heavily in favor of corporate defendants. If Petitioner's proposed rebalancing of the relative rights of patent owners and defendants is to become law, it should come from Congress. *See Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2414 (2015) ("[T]he choice of what patent policy should be lies first and foremost with Congress.")

A. Petitioner's Venue Rule Would Systematically Favor Corporate Infringers Over Patent Owners

Under Petitioner's approach, corporate defendants in patent cases could only be sued (1) where they are incorporated; or (2) where they have a regular and established place of business and infringe. A patent owner would therefore be *required* to sue infringing companies in their own backyard, even if that jurisdiction is far from and unfamiliar to the patent owner. Such a rule would guarantee numerous practical advantages to corporate defendants, including better access to local counsel, more experience and familiarity with the local court's rules and practices, and reduced travel expenses. While the district courts no doubt do their best to ensure that local biases do not interfere with the right to a fair and impartial trial, concerns about "home town advantage" remain and, if present,

would consistently skew in favor of corporate defendants.

The current approach to venue, in contrast, provides a more level playing field. First, it gives the patent owner its choice of venue so long as the corporate defendant's contacts with that venue are significant enough to confer personal jurisdiction. Second, 28 U.S.C. § 1404 provides defendants with the right to request that the court selected by the plaintiff weigh the convenience of that venue on a case-by-case basis and, if appropriate, transfer to a more convenient venue.

The undesirability of Petitioner's approach, which ties venue exclusively to the most convenient locations for the *defendant*, is demonstrated by the fact that recent legislative proposals have expressly permitted suit in jurisdictions based on the *plaintiff's* operations and activities. The Venue Equity and Non Uniformity Elimination (VENUE) Act of 2016, for example, provides for venue where (1) an inventor named on the patent in suit conducted research or development that led to the application for the patent in suit; or (2) the plaintiff has a regular and established physical facility that it controls and operates so long as certain research, development, or manufacturing occurred in that location. *See* S. 2733, 114th Cong. § 2 (2016); *see also* H.R. 9, 114th Cong. § 3(g) (2015) (same).

B. Whirlpool's Patent Enforcement Efforts Demonstrate the Importance of More Flexible Venue Options to Patent Owners

Whirlpool's experience enforcing its patents on refrigerator water filters is a case study in the difficulties faced by owners of widely infringed patents and how the current venue provision aids with cost-effective and judicially efficient enforcement.

Whirlpool has obtained patents on improved designs for replacement water filters used in Whirlpool refrigerators. Over the past several years, many patent-infringing filters appeared on the market, and Whirlpool has been committed to protecting its patent rights. There have been many infringers to contend with, and Whirlpool has filed over 40 lawsuits against manufacturers and resellers. The vast majority of these cases have settled after the defendant agreed to stop selling the infringing products.

Under prevailing law, Whirlpool has been able to sue each corporate infringer in a single district. Whirlpool's team of outside counsel is fluent in the local rules and procedures, leading to efficient prosecution of a large volume of cases. At the same time, the presiding judge has gained familiarity with Whirlpool's patents and the issues presented. Since September 2015, the court has issued two claim construction orders, entered one preliminary injunction, resolved two motions for permanent injunctions against defaulting defendants after

hearing live testimony from Whirlpool employees, and brought one case to trial.

Petitioner's approach, in contrast, would prevent Whirlpool from bringing all of its cases in a single district. If limited to the defendant's place of incorporation or where the defendant has a regular and established place of business, Whirlpool would have been forced to file suit in 17 different jurisdictions in the past 18 months. Unlike the proposed legislative amendments, Petitioner's approach would not provide Whirlpool with *any* single district in which it could bring all of its cases.[2]

The additional burden of litigating in scattershot jurisdictions would be significant. For example, rather than educating and coordinating with local counsel in one district, Whirlpool would have needed to find, retain, educate, and coordinate with at least 17 different local counsel. Learning and ensuring compliance with all local rules and practices would also require substantial resources. The volume of related cases supported by a common group of outside counsel, in-house attorneys, and employee witnesses would also present difficult logistical challenges if potentially conflicting case schedules and hearing dates were set independently by 17 different judges.

The efficient administration of justice would also suffer. Instead of requiring one judge to be

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[2] The Judicial Panel on Multidistrict Litigation would not be effective because Whirlpool has filed suit on a rolling basis. For example, at present, one of Whirlpool's cases is going to trial while defendants in other cases have yet to answer.

familiar with Whirlpool's case, the asserted patents, and the relevant technology, 17 judges (and counting) would have faced this task, leading to inefficiencies and potentially inconsistent results. *See Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 619 (2d Cir. 1968) ("There is a strong policy favoring the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently, duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses, and inconsistent results can be avoided."); *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 330 (9th Cir. 1995) (noting that inconsistent results "tend to undermine confidence in the judicial process").

C. The Eastern District of Texas's Approach to Case Management Should Not Drive Reinterpretation of the Venue Statute

Rule 1 of the Federal Rules of Civil Procedure sets forth the goal of providing "the just, speedy, and inexpensive determination of every action and proceeding." There is, however, tension between these three goals. In patent cases, practices in different jurisdictions strike different balances. The Eastern District of Texas has been criticized for its early and broad discovery, its more limited willingness to stay cases while validity is challenged at the U.S. Patent & Trademark Office, and its less frequent grant of summary judgment. Petitioner and its *amici* point to other jurisdictions that approach

these issues in a way that is different and, in their view, better.[3]

These issues present policy trade-offs. Staying consideration of infringement and damages while validity is considered at the Patent Office will tend to decrease expenses in cases where the patent is invalidated, but will increase costs and add several years to the time it takes to resolve the case for patent owners whose patents ultimately survive. Early discovery and more aggressive case schedules will promote speedier resolution, but will tend to increase upfront costs. More expansive discovery will also increase costs, but bringing more facts to light should result in more just outcomes.

Whirlpool respectfully submits that it is far more desirable to grapple with the best approach to case management practices on a case-by-case basis via existing avenues of review rather than using the extraordinarily blunt instrument of judicial reinterpretation of the venue statute. Many levers exist for tweaking the balance of these considerations in patent cases, including

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[3] Research does not suggest that the Eastern District of Texas's approach drives significantly different outcomes when compared to other jurisdictions. *See* Mark A. Lemley, Su Li & Jennifer M. Urban, *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 Stan. L. Rev. 1121, 1139 (2014) ("[D]espite the patent-friendly reputation of the Eastern District of Texas, it is not significantly more likely to produce patentee wins."); J. Gregory Sidak, *Ongoing Royalties for Patent Infringement*, 24 Tex. Intell. Prop. L.J. 161, 178 (2016) ("Although commentators sometimes perceive that the Eastern District of Texas is especially plaintiff-friendly in patent litigation, the data with respect to ongoing royalties do not support that assumption.").

modification of the Federal Rules of Civil Procedure, statutory amendments, and appellate review. Each of these approaches has been used recently in response to concerns about patent practice, and the judges in the Eastern District of Texas, like all judges, have applied the new rules and laws.

For example, Form 18 of the Federal Rules of Civil Procedure was eliminated, which had the practical effect of requiring additional detail in patent complaints. *E.g.*, *Ruby Sands LLC v. Am. Nat'l Bank of Texas*, No. 2:15-cv-01955, Dkt. No. 58 (E.D. Tex. Jun. 28, 2016) (explaining that "Form 18 no longer provides a safe harbor for direct infringement claims" and dismissing complaint for failure to state a claim). Similarly, the America Invents Act responded to criticisms about joinder by tightening the standard in patent cases. *See* 35 U.S.C. § 299; *e.g.*, *Chrimar Sys., Inc. v. ADTRAN, Inc.*, No. 6:15-cv-00618, Dkt. No. 681, at 5 (E.D. Tex. Nov. 23, 2016) (denying plaintiff's motion to join defendants for trial because plaintiff "failed to show that joinder is proper under § 299"). The Federal Circuit is also capable of addressing concerns, as it did by reviewing the standard for § 1404 motions to transfer venue in *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008), and its progeny. *E.g.*, *Realtime Data LLC v. Teradata Operations, Inc.*, No. 6:15-cv-00470, Dkt. No. 43 (E.D. Tex. Mar. 29, 2016) (granting motion to transfer to the Northern District of California under 28 U.S.C. § 1404).

Adopting a strained reinterpretation of a straightforward venue statute to deny patent owners' access to the case management approach of

one jurisdiction is an undesirable way to address the best balance of justice, speed, and expense in patent cases.

D. Eliminating Access to the Eastern District of Texas Will Deprive All Patent Owners of a Fast, Predictable, and Experienced Forum Without Solving the "Patent Troll" Problem

Many meritorious patent lawsuits are filed in the Eastern District of Texas. Whirlpool's water filter patent lawsuits, for example, do not even remotely resemble the lawsuits complained about by Petitioner and its *amici* because: (1) Whirlpool is an operating company that sells patent-practicing products; (2) the validity of its patent has been confirmed in reexamination at the Patent Office; (3) Whirlpool has produced more than twice as many pages of documents in discovery as all of the defendants in its cases combined; and (4) Whirlpool's goal is not to monetize its patents by collecting royalties—Whirlpool has been and presently remains unwilling to accept payment in exchange for a license to practice its inventions because Whirlpool prefers to supply the patented water filters itself in order to ensure that they are of high quality and work properly with its refrigerators.

In short, Whirlpool's patent lawsuits do not bear any of the indicia of abuse that are the focus of complaints about the Eastern District of Texas. But by filing there, Whirlpool has benefited from the predictability that comes from well-established local patent rules that are accompanied by a rich

interpretative case law, experienced judges, and a track record of maintaining rigorous case schedules to promote speedy resolution.

Whirlpool is not the only operating company that has chosen to enforce its patent in the Eastern District of Texas. *E.g.*, *Allergan, Inc. v. Deva Holdings A.S.*, No. 2:16-cv-01447 (E.D. Tex. 2016); *Nokia Technologies Oy v. Apple Inc.*, No. 2:16-cv-01440 (E.D. Tex. 2016); *Hitachi Maxell, Ltd. v. Huawei Techs. Co., Ltd.*, No. 5:16-cv-00178 (E.D. Tex. 2016); *Luv N' Care, Ltd. v. Brigitta Biro*, No. 5:16-cv-00047 (E.D. Tex. 2016). Many research institutions have filed there as well. *E.g.*, *Queen's University at Kingston v. Samsung Elecs. Co., Ltd.*, No. 2:14-cv-00053 (E.D. Tex. 2014); *My Health, Inc. & University of Rochester v. CardioCom, LLC*, No. 2:13-cv-00136 (E.D. Tex. 2013); *Commonwealth Scientific & Industrial Research Organisation v. MediaTek Inc.*, No. 6:12-cv-00578 (E.D. Tex. 2012); *The Regents of the University of California v. Facebook, Inc.*, No. 6:12-cv-00619 (E.D. Tex. 2012).

Whirlpool certainly does not dispute that lawsuits are also filed in the Eastern District of Texas by non-practicing plaintiffs with dubious claims that seek to exploit the high cost of defense in patent cases in order to obtain a quick "nuisance value" settlement. Whirlpool has been a defendant in such cases. However, removing "patent trolls" from the Eastern District of Texas will not remove them from the legal landscape.[4] *See* Federal Trade

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[4] Recent orders issued from the Eastern District of Texas demonstrate that its judges are working to deter meritless claims. *See Iris Connex, LLC v. Dell, Inc.*, No. 2:15-cv-01915,

Commission, Patent Assertion Entity Activity, 80 (Oct. 2016) (explaining that studied patent assertion entities "initiated cases in more than 50 different federal judicial districts," with 22% of all cases filed in Delaware). Nuisance value settlements can be, and have been, brought in multiple jurisdictions. *Id.* at 80, 91-92. Reinterpretation of Section 1400(b) will not change that, as the cost of defense will remain higher than an early five-figure settlement payment regardless of the district selected by the patent owner. *Id.* at 4 n.7 (estimating cost of defending a suit brought by a non-practicing entity through the end of discovery at $300,000 to $2.5 million); *id.* at 8 (noting that 77% of studied litigation-driven licenses "were valued at less than the estimated cost of defending a patent lawsuit through the end of discovery").

CONCLUSION

Whirlpool welcomes reforms aimed at reducing the ability of patent owners with frivolous claims to extract nuisance value settlements. However, reinterpreting the long-standing venue statute as requested by Petitioner will not accomplish that goal. Instead, it will harm innovators by both eliminating access to a fast and predictable approach to case management and also preventing patent owners from bringing all of their lawsuits in a single venue.

Dkt. No. 149 (E.D. Tex. Jan. 25, 2017) (awarding attorney fees to defendant and sanctioning plaintiff's counsel); *Edekka LLC v. 3Balls.com*, No. 2:15-cv-00541, Dkt. No. 133 (E.D. Tex. Dec. 17, 2015) (awarding attorney fees to defendants).

Respectfully submitted,

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